IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5406 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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AIYUBKHAN @ DUTTI GULABKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR YATIN SONI for MR SANJAY M DOSHI for Petitioner

MR SAMIR DAVE,AGP for Respondents

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 06/10/2000

ORAL JUDGEMENT

The order of detention dated April 19, 2000 passed by the District Magistrate, Kheda District at Nadiad, in exercise of powers conferred on him by sub-section (2) of Section 3 of the Gujarat Prevention of

Anti-Social Activities Act, 1985 ("the Act" for short) is the subject matter of challenge in the present petition, which is filed under Article 226 of the Constitution.

2. The order of detention was executed on May 31, 2000. The detaining authority had communicated the grounds of detention to the detenu immediately as required by section 9 of the Act. The detaining authority had thereafter submitted report to the State Government as contemplated by section 3(3) of the Act. On receipt of the report from the detaining authority, the State Government had approved the detention order within 12 days from the date of making of it. The State Government had thereafter referred the case of the detenu to the Advisory Board together with the grounds of detention and other relevant materials. The Advisory Board had considered the materials placed before it and reported that in its opinion there was sufficient cause for detention of the detenu. On receipt of the report from the Advisory Board, the State Government has confirmed the detention order and continued the detention of the detenu. From the grounds of detention, it is apparent that the detaining authority has taken into consideration four cases registered against the detenu under the Bombay Prohibition Act, 1949, in order to form subjective satisfaction that the petitioner is a bootlegger within the meaning of Section 2(b) of the Act. The grounds of detention further indicate that the detaining authority has taken into consideration statements of five witnesses in order to reach the subjective satisfaction that the activities of the detenu as a bootlegger disturbed the maintenance of public order and, therefore, it was necessary to detain him with a view to preventing him from acting in any manner prejudicial to the maintenance of public order.

3. Though several grounds have been urged by the learned counsel for the petitioner for challenging the order of detention, it is not necessary to refer to all of them, except one which in my opinion merits acceptance.

4. The learned counsel for the petitioner submitted that since the detenu was in custody with reference to I. C.R.No. 17/2000 registered with Anand Town Police Station on January 11, 2000 and I. C.R.No.21/2000 registered with Borsad Police Station on February 2, 2000, there was no compelling necessity to pass detention order for the obvious reason that while in custody the detenu was not likely to indulge in any prejudicial activity and, therefore, the detention order should be

set aside. In support of his submission, the learned counsel has placed reliance on the decision rendered in Kamarunnissa v. Union of India and another, AIR 1991 SC 1640.

5. The grounds of detention indicate that at the time when the detention order was passed, the detenu was in judicial custody with reference to I. C.R.No.17/2000 which is registered with Anand Town Police Station on January 11, 2000. The grounds of detention further indicate that the petitioner was also in judicial custody with reference to I. C.R.No.21/2000 registered with Borsad Police Station on February 2, 2000 when the order of detention was passed. Though the detaining authority has borne in mind the fact that the detenu was in judicial custody, the detaining authority has not considered the relevant fact as to whether he had reason to believe on the basis of reliable materials placed before him that there was real possibility of detenu being released on bail and that on being so released, he would in all probability indulge in prejudicial activity. It is well settled that even in the case of a person in custody a detention order can validly be passed (i) if the authority passing the order is aware of the fact that he is actually in custody, (ii) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released, he would in all probability indulge in prejudicial activity, and (iii) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such an order can not be struck down on the ground that the proper course for the authority was to oppose the bail and, if bail is granted notwithstanding such opposition, to question it before a higher forum. Even in a case where a person is in custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention, but the detaining authority has to exhibit the awareness to the fact that there is likelihood of the detenu being released on bail and in all probability, of his indulging in prejudicial activity. The grounds of detention do not indicate that the detaining authority was satisfied on the material placed before him that the detenu was likely to be released on bail with reference to C.R.No. I.17/2000 registered with Anand Town Police Station and I. C.R.No.21/2000 registered with Borsad Police Station. On the contrary, the grounds of detention proceed to mention that the detenu had not submitted any bail application with reference to those two cases and the cases were

pending investigation. Thus, as the petitioner was in judicial custody, there was no compelling necessity to pass detention order for the obvious reason that while in custody the petitioner was not likely to indulge in any prejudicial activity. As the detaining authority has failed to consider the relevant factors before passing the order of detention, I am of the view that his subjective satisfaction is vitiated and the order of detention is liable to be set aside.

In the result, the petition is allowed. The impugned order of detention dated April 19, 2000 passed by the District Magistrate, Khaki District at Nadiad, which is produced at Annexure-A to the petition, is hereby set aside and quashed. The respondents are directed to release the detenu immediately, unless his presence is needed with reference to any other case. Rule is made absolute, with no order as to costs. Direct Service is permitted.

(J.M.Panchal,J.)

(patel)